Kwan Chew Holdings Sdn Bhd v Kwong Yik Bank Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-02–573 OF 1997
MOKHTAR SIDIN, MOHD NOOR AHMAD AND MOHD GHAZALI JJCA
29 OCTOBER 2009

Land Law — Charge — Notice of demand — Default of repayment — Order for sale granted — Appeal against — Whether notice that demanded sums not lawfully due from chargee constituted cause to contrary — National Land Code ss 254 & 256(3) — Rules of the High Court 1980 O 83 r 3(3) & 3(6)

Kwan Chew Holdings Sdn Bhd ('the defendant'), a locally incorporated company, executed three charges over 31 pieces of land ('the lands') to secure a loan of RM550,000 from the plaintiff, a bank. When the defendant defaulted in the repayment of the banking facilities and failed to comply with the notice in Form 16D under s 254 of the National Land Code ('NLC'), the defendant applied for an order of sale of the lands. It was the plaintiff's claim that as at 31 December 1995 the total sum outstanding in the defendant's statement of account, inclusive of the total amount of interest in arrears, was RM1,895,825.13. The plaintiff further claimed that the interest would continue to accrue at the rate of 3.5% above the plaintiff's base lending rate ('BLR') per annum calculated on monthly rests until the date of full payment. In its defence, inter alia, the defendant denied the plaintiff's claim that there was a balance of RM1,895,825.13 due and owing by them to the plaintiff as at 31 December 1995. The defendant alleged that since the amount advanced by the plaintiff to the defendant was only RM470,360.61 and not RM649,915.49 as set out in the statement of account the amount disclosed as the balance outstanding was also in error. The defendant further averred that the arrears of interest that arose after six years from the date the sum became due could not be claimed by the plaintiff pursuant to s 21(5) of the Limitation Act 1953. The trial judge found that the plaintiff's failure to release the loan monies, the raising of interest to 3.5% above the BLR and the differences in the statements of account did not amount to cause to the contrary under s 256(3) of the NLC. Thus the High Court judge granted the plaintiff bank an order for the sale of the lands charged by public auction to recover the sum of RM2,399,918 owed by the defendant to the plaintiff as at 8 August 1997 with interest. This was an appeal against that judgment. In its appeal the defendant submitted that the plaintiff had not stated the correct statutory particulars in its supporting affidavits, namely, the correct amount of the advance, the correct interest in arrears or the correct amount remaining due under the charge. Although at the appellate stage the plaintiff conceded that the amount

advanced as claimed was erroneous, viz, it should not be RM649,915.49 as set out in its affidavits, it submitted that a mere failure to give details and particulars did not raise a 'cause to the contrary' pursuant to s 256(3) of the NLC. The sole issue for consideration in this appeal was whether a notice that demanded sums not lawfully due from the chargee constituted a cause to the contrary.

Held, allowing the appeal with costs:
In the instant appeal there was a failure to comply with O 83 r 3(6) and 3(3) of the Rules of the High Court 1980, because the notice to the defendant chargee demanded sums not lawfully due from the chargee. Since the statutory demand in Form 16D was for a greater sum than that owed by the defendant, it was accordingly a wrongful demand for payment and that would constitute cause to the contrary (paras 18–19 & 21).

[Bahasa Malaysia summary

Kwan Chew Holdings Sdn Bhd ('defendan'), sebuah syarikat perbadanan tempatan, telah melaksanakan tiga gadaian ke atas 31 bidang tanah ('tanah-tanah tersebut') untuk menjamin pinjaman berjumlah RM550,000 daripada plaintif, sebuah bank. Apabila defendan gagal untuk membuat bayaran balik bagi kemudahan perbankan dan gagal untuk mematuhi notis Borang 16D di bawah s 254 Kanun Tanah Negara ('KTN'), defendan telah memohon untuk perintah jualan bagi tanah-tanah tersebut. Ia merupakan tuntutan plaintif bahawa pada 31 Disember 1995, jumlah keseluruhan yang tertunggak di dalam penyata akaun defendan, termasuk amaun keseluruhan faedah tertunggak, adalah RM1,895,825.13. Plaintif selanjutnya mendakwa bahawa faedah seterusnya akan terakru pada kadar 3.5% melebihi kadar pinjaman asas ('KPA') setahun plaintif dikira atas dasar baki bulanan sehingga tarikh pembayaran penuh. Dalam pembelaannya, antara lain, defendan menafikan tuntutan plaintif bahawa terdapat baki berjumlah RM1,895,825.13 yang perlu dibayar olehnya kepada plaintif pada 31 Disember 1995. Defendan berhujah bahawa memandangkan amaun yang didahulukan oleh plaintif kepada defendan adalah RM470,360.61 sahaja dan bukan RM649,915.49 seperti yang dinyatakan di dalam penyata akaun, amaun yang dikemukakan sebagai baki tertunggak adalah salah. Defendan selanjutnya menegaskan bahawa faedah terakru yang timbul selepas enam tahun dari tarikh jumlah perlu dibayar tidak boleh dituntut oleh plaintif mengikut s 21(5) Akta Had Masa 1953. Hakim perbicaraan mendapati bahawa kegagalan plaintif untuk mengeluarkan wang pinjaman, kenaikan faedah 3.5% melebihi KPA dan perbezaan di dalam penyata akaun tidak membentuk sebab di sebaliknya di bawah s 256(3) KTN. Oleh itu, hakim Mahkamah Tinggi memberikan plaintif bank satu perintah jualan tanah-tanah yang digadaikan melalui lelongan awam untuk mendapatkan jumlah RM2,399,918 yang terhutang oleh defendan kepada plaintif pada 8 Ogos 1997 dengan faedah. Ini merupakan rayuan terhadap penghakiman tersebut.

A Dalam rayuannya, defendan berhujah bahawa plaintif tidak menyatakan butiran statutori yang betul di dalam afidavit sokongannya, iaitu amaun sebenar yang didahulukan, faedah terakru sebenar atau amaun sebenar yang harus dibayar di bawah gadaian tersebut. Walaupun pada peringkat rayuan, plaintif bersetuju bahawa amaun yang didahulukan seperti yang didakwa
B adalah salah sama sekali, iaitu, ia bukanlah RM649,915.49 seperti yang dinyatakan di dalam afidavitnya, ia berhujah bahawa kegagalan untuk memberi maklumat dan butiran tidak menimbulkan 'sebab di sebaliknya' mengikut s 256(3) KTN. Isu utama untuk pertimbangan dalam rayuan ini adalah sama ada notis menuntut jumlah yang mana bukanlah jumlah kena
C bayar yang sah daripada penerima gadaian merupakan satu sebab disebaliknya.

Diputuskan, membenarkan rayuan dengan kos:
Dalam rayuan ini, terdapat kegagalan untuk mematuhi A 83 k 3(6) dan 3(3) Kaedah-Kaedah Mahkamah Tinggi 1980, disebabkan notis kepada defendan,
D penerima gadaian, menuntut jumlah yang bukan jumlah kena bayar yang sah. Memandangkan tuntutan statutori dalam Borang 16D adalah jumlah yang lebih besar daripada yang dihutang oleh defendan, ianya merupakan tuntutan bayaran yang salah dan membentuk sebab di sebaliknya (lihat perenggan 18–19 & 21).
E]

Notes

For cases on notice of demand, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2354–2375.

F

Cases referred to

Bank Pertanian Malaysia v Zainal Abidin bin Kassim & Anor [1995] 2 MLJ 537, HC (refd)
Citibank NA v Ibrahim bin Othman [1994] 1 MLJ 608, HC (refd)
G *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77, FC (refd)

Legislation referred to

Limitation Act 1953 s 21(5)
National Land Code ss 254, 256, 256(3) Form 16D
H Rules of the High Court 1980 O 83, O 83 r 3(3), (6)

Appeal from: Originating Summons No 24–156 of 1996 (High Court, Seremban)

Ramdas Tikamdas (Siva, Ram & Associstes) for the appellant.
Leong Wai Heong (June Tan Mei Ling with him) (Skrine) for the respondent.
I

Mohd Ghazali JCA (delivering judgment of the court):

[1] This is the unanimous judgment of the court.

[2] This is an appeal against the decision of Mohd Noor Abdullah J (as he then was). The learned judge of the High Court granted to the plaintiff (the respondent in this appeal) an order for sale of 31 pieces of land ('the said lands') which was charged under the provisions of the National Land Code ('the Code') by the defendant (the appellant in this appeal) in favour of the plaintiff. We will refer to the parties as they were in the High Court.

[3] We had allowed the appeal with costs and ordered that the order for sale be set aside. We further ordered that the deposit be remitted to the defendant to account of taxed costs. The following are our reasons for the decision that we made.

THE BACKGROUND

[4] On 7 January 1984, 25 April 1984 and 25 September 1984 the defendant, a locally incorporated company executed three charges respectively over the said lands to secure a loan of RM550,000. Based on these securities, the plaintiff, a bank disbursed the facilities to the defendant.

[5] By letter dated 20 September 1995, the plaintiff through its solicitors demanded from the defendant payment of the sum of RM1,832,893.46 being the amount owing by the defendant to the plaintiff, as at 13 September 1995 together with interest thereon at the rate of 3.5% above the plaintiff's base lending rate ('BLR') per annum with monthly rests to be made within seven days to the date thereof failing which foreclosure proceedings would be instituted.

[6] On 18 October 1995 the plaintiff's solicitors sent by hand to the defendant a notice in Form 16D under s 254 of the Code dated 13 October 1995 calling on the defendant to remedy the breach committed under the three charges within 14 days from the service of the notice. The defendant did not comply with the notice and hence the plaintiff applied to the High Court for an order for sale.

[7] By originating summons dated 9 April 1996 the plaintiff prayed against the defendant for, inter alia, an order for sale of the said lands. The application for order for sale was made pursuant to the defendant's default in the repayment of banking facilities and failure to comply with the notice in Form 16D under s 254 of the Code.

[8] It was the plaintiff's claim that the statement of account of the monies owing by the defendant as at 31 December 1995 stood as follows:

(i)	amount advanced	RM 649,915.49
(ii)	total amount of repayments	-nil-
(iii)	total amount of interest in arrears	RM1,245,909.64
(iv)	balance outstanding as at 31.12.95	RM1,895,825.13

and that after 1 January 1996, interest will continue to accrue at the rate of 3.5% above the plaintiff's BLR per annum calculated on monthly rests until the date of full payment; the daily interest is currently at RM610.30 until capitalisation of interest on 31 January 1996.

[9] In its defence the defendant, inter alia, denied the plaintiff's claim that there is a balance of RM1,895,825.13 owing by them to the plaintiff as at 31 December 1995. The defendant pointed out that the sum of RM649,915.49 claimed as 'amount advanced' is not true at all and contended it is clearly evidenced by the plaintiff's own bank statements that the total principal sum advanced by the plaintiff to the defendant pursuant to the secured bridging loan was only RM470,360.61. The defendant then averred that the arrears of interest after the lapse of six (6) years from the date the sum became due or purportedly became due cannot be claimed by the plaintiff pursuant to s 21(5) of the Limitation Act 1953.

IN THE HIGH COURT

[10] On 8 August 1997 the learned judge of the High Court gave an order, inter alia, for sale of the said lands by public auction to recover the sum of RM2,399,918 owed by the defendant to the plaintiff as at 8 August 1997 together with interest accruing thereon at the rate of 3.5% above the plaintiff's BLR per annum at monthly rests from 8 August 1997 to the date of realisation (the daily interest is currently at RM822.85 until capitalisation of interest on 31 August 1997) in accordance with the terms of the three charges.

[11] In his grounds of judgment, the learned judge said the guidelines dealing with order for sale under s 256 of the Code has been laid down in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 where the Federal Court held that 'cause to the contrary' within s 256(3) of the Code might be established only in three categories of cases, namely:

(a) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s 340 of the Code;

(b) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and

(c) when a chargor could demonstrate that the grant of an order for sale would be contrary to some rule of law or equity;

and if no cause to the contrary could be shown, the court would be obliged to make an order for sale.

[12] The learned judge made further reference to the judgment in *Low Lee Lian* where the Federal Court opined that there must be a speedy and summary trial and attention being paid to the following:

(a) whether the chargee has given statutory notice;

(b) whether O 83 of the Rules of the High Court 1980 was complied; and

(c) whether there is cause to the contrary.

[13] The learned judge was of the view that based on the decision in *Low Lee Lian*, the plaintiff's failure to release the loan monies, the raising of interest to 3.5% above the BLR and the differences in the statements of account do not amount to cause to the contrary under s 256(3) of Code. On the issue of limitation, the learned judge was of the view that it is correct that according to cl 1 of the charge the defendant's liability to pay depends on what was claimed by the plaintiff and in this case, the plaintiff's letter of demand dated 20 September 1995 was for payment of the sum of RM1,832,893.46 being the amount owing by the defendant to the plaintiff as at 13 September 1995 together with interest thereon at the rate of 3.5% above the plaintiff's BLR (currently at 7.55%) per annum with monthly rests to be made within seven days to the date thereof and so it is not correct to say that plaintiff claimed arrears of interest beyond the six years period.

[14] In conclusion the learned judge ruled that the defendant has failed to show any cause to the contrary under s 256(3) of the Code and as such allowed the plaintiff's application.

THE APPEAL

[15] In his submission, learned counsel for the defendant highlighted the following:

(a) that the plaintiff's affidavit in support of the application for order for sale stated the state of the account with particulars as follows:

(i)	Amount advanced	RM 649,915.49
(ii)	Total amount of repayments	RM Nil
(iii)	Total amount of interest in arrears	RM1,245,909.64

Balance outstanding as at 31.12.95	RM1,895,825.13;

(b) thereafter the plaintiff affirmed the state of the accounts in three other affidavits where they repeated and reiterated the amount advanced as RM649,915.49 and gave the updated amount of interest in arrears as RM1,407,928.05, RM1,490,394.72 and RM1,727,617.78;

(c) on 8 August 1997 the learned judge gave an order for sale of the said lands by public auction to recover the sum of RM2,399,918 owed by the defendant to the plaintiff at 8 August 1997 with interest thereon at 3.5% above BLR from 8 August 1997 till date of full realisation.

[16] Our decision to allow the appeal by the defendant were premissed on the following issues canvassed by learned counsel for the defendant, namely:

(a) that the plaintiff has failed to comply with the statutory provisions of O 83 r 3(6) of the Rules of the High Court which provides that where the plaintiff claims payment of monies secured by the charge, the affidavit must prove that the money is due and payable and give the particulars mentioned in para (3); and

(b) that the plaintiff's supporting affidavit and also the subsequent affidavits did not state the correct statutory particulars, namely:

(i) the correct amount of the advance;

(ii) the correct interest in arrears;

(iii) the correct amount remaining due under the charge;

(c) that the plaintiff wrongly stated the amount of the advance as RM649,915.49 when in fact the plaintiff's own affidavit stated that the facility was restructured from RM550,000–RM520,000 only; further, the report by Peat Marwick Consultants Sdn Bhd (KPMG report) adduced in evidence stated that the bridging loan disbursed by the plaintiff was in fact only RM520,000 and the balance amounting to RM30,000 was not disbursed;

(d) that the plaintiff's affidavit affirmed on 23 August 1996 also did not give the correct amount due under the charge in that the sum claimed as outstanding as on 9 April 1996 was RM2,021,042.35 whereas the plaintiff's own bank statement as on 30 April 1996 (inclusive of interest) showed an amount of RM1,972,298.44 only;

(e) that the plaintiff therefore have claimed in their Form 16D notice and originating summons sums which they are not entitled to and which are not lawfully due to them.

[17] In opposing the appeal, learned counsel for the plaintiff conceded that there was no compliance with O 83 of the Rules of the High Court. He also agreed that the amount advanced as claimed was erroneous, viz, its should be RM520,000 and not RM649,915.49. Be that as it may, in his written submission on these issues, learned counsel for the plaintiff canvassed as follows:

(i) The plaintiff submits that the requirements in O 83 have been observed. This is adequately evidenced in the plaintiff's affidavit supporting the OS as well as the reply written submissions prepared by the plaintiff;

(ii) In any event, the plaintiff submits that a mere failure to give details and particulars did not raise a 'cause to the contrary' pursuant to s 256(3) of the NLC.

[18] With regards to the issue as to whether it would be a 'cause to the contrary' where the notice demands sums not lawfully due from the chargee, we would refer to *Low Lee Lian*, where Gopal Sri Ram JCA (as he then was) in delivering the judgment of the Federal Court said (at p 83):

> ... a chargor may show cause to the contrary within s 256(3) of the Code by demonstrating that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale. For example, failure on the part of the chargee to prove the making of a demand or service upon the chargor of a notice in Form 16D would constitute cause to the contrary. *So too, where the notice demands sums not lawfully due from the chargee*. See *Co-Operative Central Bank Ltd v Meng Kuang Properties Bhd* [1991] 2 MLJ 283. However in such a case, it would be open to the chargee to subsequently serve a notice or a proper notice (as the case may be) before commencing proceedings afresh as the cause shown to the contrary does not in substance affect the chargee's right to apply for an order for sale.
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> (Emphasis added.)

[19] In relation to the issue on failure to comply with the requirements of O 83 r 3(6) read with O 83 r 3(3) of the Rules of the High Court, we would refer to *Bank Pertanian Malaysia v Zainal Abidin bin Kassim & Anor* [1995] 2 MLJ 537 where Mohd Hishamudin J (as he then was) said (at p 541):

> In my opinion, the failure to comply with rr 3(6) and 3(3), in particular, *the failure to state*:
>
> (a) *the amount of the repayments; and*
>
> (b) *the amount of instalments in arrear,*
>
> *are serious omissions which warrant a dismissal of the action; for the absence of such pertinent information is highly prejudicial to the defendants* ... Fairness requires the chargee not only to state in the affidavit but also to state

accurately the amount of repayments made and the amount of instalments in arrear. It hardly needs to be reiterated here that the purpose of the rule is also to protect the interest of the debtor/chargor.

(Emphasis added.)

We were of the same view.

[20] With regards to O 83 r 3 of the Rules of the High Court, Mahadev Shankar J (as he then was) in *Citibank NA v Ibrahim bin Othman* [1994] 1 MLJ 608 said (at p 614–615):

> The objective of the present legislation is to enable the chargee to know at least by the date the originating summons is filed, what is the exact sum he is legally liable to pay. What has to be shown is the state of the account with the statutory particulars. If there is a dispute as to the amount payable, the court must be able to say precisely when making its order 'the total amount due to the chargee at the date on which the order is made'. These words are from s 257(1)(c) of the NLC and they are mandatory.
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> It is a well-established rule of construction that unless the context specifically so excludes, words in the singular must include the plural. It is to be noted that O 83 r(3)(3) gives the court the power to dispense with the statutory particulars 'in any case or class'. More than one affidavit can and is usually filed in this type of case because invariably the matter cannot be disposed of on the first return date (eg for non-service) and at least one further affidavit is always required to state the total amount due on the date of the order. *Provided evidence of the correct amount due has been put before the final hearing, the court has the power to dispense some omission to fulfil the rules to the letter, but only if no real prejudice will thereby result to the defendant*.
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> (Emphasis added.)

[21] Following the authorities referred to above with which we agree, we were of the view that in the instant appeal, since the statutory demand in Form 16D was for a sum greater than that owed by the defendant, it was accordingly a wrongful demand for payment and that would certainly constitute cause to the contrary. The learned judge failed to deal with these issues in making the decision that he did and for these reasons we had allowed the appeal with costs and ordered that the order for sale be set aside. We had also ordered the deposit be remitted to the defendant to account of taxed costs.

Appeal allowed with costs.

Reported by Kohila Nesan